STATE OF MICHIGAN

COURT OF APPEALS

PONTIAC SCHOOL DISTRICT, Respondent-Appellee,	UNPUBLISHED September 15, 2015
v	No. 322184 MERC
PONTIAC EDUCATION ASSOCIATION, Charging Party-Appellant.	LC No. 12-000646

Before: BORRELLO, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Charging Party, Pontiac Education Association (the "Association"), appeals as of right an order issued by the Michigan Employment Relations Commission ("MERC") dismissing the Association's unfair labor practice charge against respondent, Pontiac School District. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

In 2008, the Association filed Grievance #06-06/07, protesting respondent's practice of filling permanently vacant teaching positions with long-term substitute teachers. The grievance was resolved by a letter agreement providing that respondent "will make every effort to hire only certified and highly qualified teachers to fill all vacancies," unless respondent provided proof "that a valid substitute permit has been applied for and subsequently issued by the Michigan Department of Education." The parties' collective bargaining agreement (CBA) for the period 2007-2011, article 5, item 9, provided:

> All teaching positions covered by this Agreement shall be staffed by teachers. All student teachers and teacher trainees in K-12 and Continuing Education Programs shall be under the supervision of a tenure teacher. Teachers may voluntarily accept the assignment of a student teacher or teacher trainee. A personal interview shall occur between the teacher and the student or trainee prior to assignment, whenever possible.

It is undisputed that the above language was in effect at the time of the resolution of grievance #06-06/07, also known as the 2008 settlement agreement.

In March 2012, the Association filed grievance #14-11/12 against respondent, alleging that respondent violated the parties' collective bargaining agreement and the 2008 letter agreement by employing long-term substitute teachers instead of highly qualified certified teachers. The Association sought relief that included recall of laid-off teachers to positions presently held by substitutes. The parties entered into a settlement agreement, which was signed by Tim Gardner, respondent's general counsel, and Aimee McKeever, president of the Association. The agreement stated:

> The District (PSD) acknowledges the recall rights of Grievants Kaee Johnson, Damon Johnson, Janet Marie Kunts, and Janet McCasland. Their recall rights will be affected [sic] as soon as possible. The above mentioned grievants including Mr. LeFlore waive all rights to any back pay.
>
> Grievant David Leflore continues to have recall rights although there are no current vacancies for which he is qualified.
>
> If necessary, Grievant Tim Mohan continues to have recall rights and his recall will be effective immediately. Mr. Mohan also waives his right to back pay.

One week later, Gardner notified McKeever that respondent had rescinded the settlement. In his letter, Gardner wrote the following:

> Effective February 12, 2013, the Pontiac School District hereby withdraws the settlement agreement reached in Grievance Number 14-11/12. In Michigan, it is well-settled law that settlement agreements are binding until rescinded for cause. Consistent with Michigan law, PSD has tendered back all consideration received under this agreement, thus returning both parties to the status quo. (Footnotes omitted).[1]

The Association filed an unfair labor practice charge against respondent, alleging that respondent was "filling permanently vacant positions with long term substitutes for the duration of the 2012-2013 school year," in violation of the 2008 letter agreement. The Association contended that respondent's repudiation of the settlement agreement was unjustified, and constituted an unfair labor practice.

Administrative law judge (ALJ) Julia Stern issued an order requiring respondent to "show cause within twenty-one days" why the February 5, 2013, settlement agreement was not binding, and why its refusal to honor the settlement was justified. Respondent combined its response to the show-cause order with a motion for summary disposition. Respondent argued that the settlement agreement was not enforceable because teachers' rights to be recalled from layoff was a prohibited subject of bargaining. Respondent also argued that there could not be a violation of

[1] This Court makes no ruling relative to the applicability of the cases cited in Respondent's letter to the repudiation of settlement agreements reached pursuant to a CBA.

the 2008 letter agreement unless a laid-off teacher actually applied for a vacant position, which the Association did not allege.

The Association argued in response that the 2008 agreement resolving Grievance #06-06/07 addressed respondent's practice of using long-term substitutes instead of hiring highly qualified and certified teachers. Respondent violated this agreement by filling permanently vacant positions with long-term substitutes in the 2012-2013 school year. The Association argued that respondent's unilateral repudiation of a binding settlement agreement not only infringed upon the rights of the individuals named in the agreement, but also undermined the interests of stability, reliability, and good-faith bargaining.

The ALJ concluded that § 15(3)(j) should be "broadly interpreted to make all decisions over teacher placement prohibited subjects of bargaining." She concluded that a provision in a grievance settlement that embodied a prohibited subject of bargaining became unenforceable with the enactment of 2011 PA 103. The ALJ concluded:

> In the instant case, the grievance that gave rise to the February 5, 2013 settlement agreement was a grievance over Respondent's alleged failure to hire highly qualified teachers to fill vacancies. *Had the parties merely agreed that Respondent would hire teachers to fill these vacancies instead of using long-term substitutes, the settlement agreement would not have constituted an agreement on a prohibited subject of bargaining.* However, the February 5 agreement commits Respondent to place particular individuals in vacant positions, including positions vacant at the time of the agreement and positions to become vacant in the future. (Emphasis added).

The ALJ further noted that there was no evidence whether the July 19, 2011, collective bargaining agreement was still in effect on February 12, 2013, but if it was, respondent was permitted to follow its recall policies under the collective bargaining agreement even if those policies were in violation of § 1248, the amendment to the school code.

The Association filed objections to the ALJ's recommended order. The Association asserted that respondent failed to articulate its reason for rescinding the 2012 settlement. The Association argued that the ALJ erred in ignoring the June 6, 2008 letter agreement, and in deciding the motion without a hearing. The Association also argued that § 15(3)(j) did not preclude the settlement agreement, because when that provision is read in tandem with the revised school code, it was clear that § 15(3)(j) applies only to cases of staff reductions. The Association emphasized that the substance of Grievance #14-11/12 was respondent's failure to comply with the 2008 agreement, not the recall rights of laid-off teachers.

Respondent asserted that ALJ Stern correctly concluded that the settlement agreement committing respondent to recall individual teachers infringed on a prohibited subject of bargaining, arguing that the Association's "additional allegations" regarding the 2008 agreement also pertained to a prohibited subject of bargaining. Respondent also argued that the Association failed to set forth a cause of action regarding breach of the 2008 letter agreement.

The MERC acknowledged that unilateral repudiation of a settlement is generally unlawful, but held that the pertinent question was whether respondent's repudiation constituted a breach of respondent's duty to bargain. The MERC held that the settlement agreement was not binding, and that respondent's rescission was not a breach of its duty to bargain, because § 15(3)(j) provides that teacher placement is a prohibited subject of bargaining. The MERC stated that "providing recall rights to designated individuals" was not a subject that could be lawfully bargained. The MERC also concluded that the Association did not allege facts in support of a claim that respondent had repudiated the 2008 agreement. The MERC concluded:

> [W]e agree with the ALJ that the facts alleged in the charge do not support a finding that Respondent breached its duty to bargain. This matter was appropriately resolved on summary disposition as the charge failed to state a claim upon which relief can be granted under PERA. The ALJ's Decision and Recommended Order is affirmed.
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> This appeal then ensued.

II. STANDARD OF REVIEW

Both parties agree that in this case, in the absence of any factual hearings, the standard of review is de novo. The decisions of the MERC are reviewed on appeal pursuant to Const 1963, art 6, § 28, and MCL 423.216(e). The MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. MCL 24.306(1)(a),(f). *Grandville Mun Exec Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). See also, *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 450; 473 NW2d 249 (1991). The Michigan Administrative Code provides grounds for summary disposition in administrative proceedings, which include failure to state a claim for relief, and the absence of a genuine issue of material fact. Mich Admin Code R 423.165(2)(d) and (f). Because these provisions parallel summary disposition motions under MCR 2.116(C)(8) and (10), respectively, established standards for reviewing motions under those subrules may be applied by analogy.

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden*, 461 Mich at 119 (citation and internal quotation omitted). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 120. When deciding a motion under MCR 2.116(C)(10), a trial court may consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the nonmoving party. *Id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists when, viewed in the light most favorable to the non-moving party, reasonable minds could differ on an issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. ANALYSIS

Section 15(3) of the Public Employee Relations Act ("PERA"), MCL 423.215(3), provides that "[c]ollective bargaining between a public school employer and a bargaining representative of its employees shall not include" certain enumerated subjects. MCL 423.215(4) provides that "the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative . . . and, for the purposes of this act, are within the sole authority of the public school employer to decide." In 2011 PA 103, our Legislature amended MCL 423.215(3) to include additional prohibited subjects for collective bargaining, including the following subject pertinent to this appeal:

> (j) Any decision made by the public school employer regarding the placement of teachers, or the impact of that decision on an individual employee or the bargaining unit.

This amendment was approved on July 19, 2011, and became immediately effective.

In *Mich State AFL-CIO v Mich Employment Relations Comm*, 453 Mich 362; 551 NW2d 165 (1996), the plaintiff labor unions argued that §§ 15(3) and (4) violated public school employees' First Amendment right of free speech by prohibiting collective bargaining over enumerated subjects. *Id.* at 379-380. Our Supreme Court held that this argument was based on "an overly expansive interpretation of these sections." The Court held that "nothing in the subsections prohibits discussion" of the prohibited subjects, explaining:

> Instead, they prohibit public school employers from collectively bargaining over these subjects with their employees. Collective bargaining as a process requires both parties to confer in good faith-to listen to each other. MCL § 423.215(1). The First Amendment does not. . . . In these subsections, the Legislature simply has removed the statutory requirement that public school employers listen to their employees and instructed the employers not to collectively bargain with regard to these subjects. In effect, the Legislature simply classified the disputed subjects as illegal subjects of collective bargaining. That classification does not implicate First Amendment rights. [*Mich State AFL-CIO*, 453 Mich at 380 (citation omitted).]

In a footnote, the Court quoted *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 n 6; 214 NW2d 803 (1974), as follows:

> An "illegal" subject of bargaining is a provision, such as a closed shop, that is unlawful under the collective bargaining statute or other applicable statute. "The parties are not explicitly forbidden from discussing matters which are illegal subjects of bargaining, but a contract provision embodying an illegal subject is . . . unenforceable." [*Mich State AFL-CIO*, 453 Mich at 380 n 9.]

More importantly, citing *Edwards, The Emerging Duty to Bargain in the Public Sector*, 71 Mich L Rev 885, 895 (1973) our Supreme Court stated: "An 'illegal' subject of bargaining is a provision, such as a closed shop, that is unlawful under the collective bargaining statute or other applicable statute. The parties are not explicitly forbidden from discussing matters which

are illegal subjects of bargaining, but a contract provision embodying an illegal subject is, * * * unenforceable." *Edwards*, supra, 909. *Detroit Police Officers Ass'n* 391 Mich 54-55 n 6.

Such is the case presented here. The parties' agreement to settle the 2013 grievance clearly pertains to the prohibited subject of teacher placement. The agreement specifies individual teachers who will be recalled immediately to fill vacant positions occupied by long-term substitute teachers. Although the settlement agreement does not specify the vacant positions, it states that respondent "acknowledges the recall rights" of four individuals (possibly five, if Mohan is included), and provides that these four or five persons' "recall rights will be [e]ffected as soon as possible." This language clearly indicates that the parties identified four vacant positions that will be taken by the named persons. The provision that "Leflore continues to have recall rights although there are no current vacancies" contemplates that Leflore will be placed in a vacancy when a suitable vacancy becomes available.

Accordingly, the MERC did not err when it held that the settlement agreement clearly contravenes § 15(3)(j)'s prohibition of collective bargaining of "[a]ny decision made by the public school employer regarding the placement of teachers, or the impact of that decision on an individual employee . . . ." Simply put, the settlement agreement contained a prohibited subject of bargaining, and once reduced to writing could not form the basis of an unfair labor practice charge because it was unenforceable. *Detroit Police Officers Ass'n*, 391 Mich 54-55 n 6.[2]

Affirmed. No costs are awarded.

/s/ Stephen L. Borrello
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell

[2] In reaching this conclusion, we make no findings regarding whether the 2008 settlement agreement remains enforceable. Respondent's letter of repudiation indicated that the intent of the repudiation was to return the parties to the "status quo." Additionally, the ALJ made findings previously cited in this opinion which could lead to a legal conclusion that the terms and conditions of the 2008 settlement agreement were not altered by changes to PERA. However, we concur with the findings of the MERC, found on pp. 3-4 of their opinion and order in this matter where they detail the Association's inability to clearly state whether they are pursuing enforcement of the 2008 settlement agreement. Additionally, on appeal, we concur with Respondent that the Association's failure to brief the issue of the enforceability of the 2008 settlement agreement constitutes a waiver of that issue. "This Court will not search for authority to sustain or reject a party's position. The failure to cite sufficient authority results in the abandonment of an issue on appeal." *Hughes v Almena Twp*, 284 Mich App 50, 71-72; 771 NW2d 453 (2009) (citation omitted). Therefore, this issue is deemed abandoned.